

261(c), as the more specific provision, controls over section 261(b) for matters that fall within its scope.<sup>164</sup> We note, too, that section 261(c) encompasses all state requirements. It is not limited to requirements that were prescribed prior to the enactment of the 1996 Act. By providing that state requirements for *intrastate* services must be consistent with the Commission's regulations, section 261(c) buttresses our conclusion that the Commission may establish regulations regarding intrastate aspects of interconnection, services, and access to unbundled elements.

99. Section 601 of the 1996 Act and section 256 also are consistent with our conclusion. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."<sup>165</sup> We conclude that section 251(d)(1), which requires the Commission to "establish regulations to implement the requirements of this section,"<sup>166</sup> and section 261(c), were expressly intended to modify federal and state law and jurisdictional authority.

100. Section 256, entitled "Coordination for Interconnectivity," has no direct bearing on the issue of the Commission's authority under section 251, because it provides only that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996."<sup>167</sup> That provision is relevant, however, as a contrast to section 251, which does not contain a similar statement that the scope of the Commission's authority is unchanged by section 251.<sup>168</sup>

101. We further conclude that the Commission's regulations under section 251 are binding on the states, even with respect to intrastate issues. Section 252 provides that the agreements state commissions arbitrate must comply with the Commission's regulations established pursuant to section 251. In addition, section 253 requires the Commission to preempt state or local regulations or requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>169</sup> As

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<sup>164</sup> *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

<sup>165</sup> 47 U.S.C. § 601(c)(1).

<sup>166</sup> 47 U.S.C. § 251(d)(1).

<sup>167</sup> 47 U.S.C. § 256(c) (emphasis added).

<sup>168</sup> *Russello v. United States*, 464 U.S. 16, 23 (1983); *Cramer v. Internal Revenue Service*, 64 F.3d 1406, 1412 (9th Cir. 1995) (where Congress includes a provision in one section of statute but omits it in another section of the same Act, it should not be implied where it is excluded).

<sup>169</sup> 47 U.S.C. § 253(a).

discussed above, section 261(c) provides further support for the conclusion that states are bound by the regulations the Commission establishes under section 251.

102. We disagree with claims that section 251(d)(3) "grandfathers" existing state regulations that are consistent with the 1996 Act, and that such state regulations need not comply with the Commission's implementing regulations. Section 251(d)(3) only specifies that the Commission may not preclude enforcement of state access and interconnection requirements that are consistent with section 251, and that do not substantially prevent implementation of the requirements of section 251 or the purposes of Part II of Title II. In this Report and Order, we set forth only such rules that we believe are necessary to implement fully section 251 and the purposes of Part II of Title II. Thus, state regulations that are inconsistent with our rules may "substantially prevent implementation of the requirements of this section and the purposes of [Part II of Title II]." <sup>170</sup>

103. We are not persuaded by arguments that, because other provisions of the 1996 Act specifically require states to comply with the Commission's regulations, the absence of such requirement in section 251(d)(3) indicates that Congress did not intend such compliance. Section 251(d)(3) permits states to prescribe and to enforce access and interconnection requirements only to the extent that such requirements "are consistent with the requirements" of section 251 <sup>171</sup> and do not "substantially prevent implementation" of the requirements of section 251 and the purposes of Part II of Title II. <sup>172</sup> The Commission is required to establish regulations to "implement the requirements of the section." <sup>173</sup> Therefore, in order to be consistent with the requirements of section 251 and not "substantially prevent" implementation of section 251 or Part II of Title II, state requirements must be consistent with the FCC's implementing regulations. <sup>174</sup>

## D. Commission's Legal Authority and the Adoption of National Pricing Rules

### 1. Background

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<sup>170</sup> 47 U.S.C. § 251(d)(3)(C).

<sup>171</sup> 47 U.S.C. § 251(d)(3)(B).

<sup>172</sup> 47 U.S.C. § 251(d)(3)(C).

<sup>173</sup> 47 U.S.C. § 251(d)(1).

<sup>174</sup> We recognize that, in some instances, whether particular state requirements are consistent with the Commission's rules may need to be considered on a case-by-case basis.

104. In the NPRM, we sought comment on our tentative conclusion that sections 251(c)(2), (c)(3), and (c)(6) establish the Commission's legal authority under section 251(d) to adopt pricing rules to ensure that the rates, terms, and conditions for interconnection, access to unbundled network elements, and collocation are just, reasonable, and nondiscriminatory.<sup>175</sup> We also sought comment on our tentative conclusion that sections 251(b)(5) and 251(c)(4) establish our authority to define "wholesale rates" for purposes of resale, and "reciprocal compensation arrangements" for purposes of transport and termination of telecommunications services.<sup>176</sup> In addition, we asked parties to comment on our tentative conclusion that the Commission's statutory duty to implement the pricing requirements of section 251, as elaborated in section 252, requires that we establish pricing rules interpreting and further explaining the provisions of section 252(d). The states would then apply these rules in establishing rates pursuant to arbitrations and in reviewing BOC statements of generally available terms and conditions.<sup>177</sup>

105. We further sought comment on our tentative conclusion that national pricing rules would likely reduce or eliminate inconsistent state regulatory requirements, increase the predictability of rates, and facilitate negotiation, arbitration, and review of agreements between incumbent LECs and competitive providers.<sup>178</sup> We also sought comment on the potential consequences of the Commission not establishing specific pricing rules.<sup>179</sup>

## 2. Comments

106. *Legal Authority.* The Department of Justice, GSA/DoD, many potential new entrants, and a few state commissions maintain that the Act gives the Commission a critical role in establishing national pricing rules to ensure that the rates for interconnection, access to unbundled network elements, and collocation are just, reasonable, and nondiscriminatory.<sup>180</sup> They contend that section 251(d)(1) specifically directs the Commission, without limitation, to

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<sup>175</sup> NPRM at para. 117.

<sup>176</sup> *Id.* at 118.

<sup>177</sup> *Id.* at para. 118.

<sup>178</sup> *Id.* at para. 119.

<sup>179</sup> *Id.*

<sup>180</sup> *See, e.g.*, DoJ comments at 24-25; GSA/DoD comments at 8, reply at 6; Teleport comments at 44; ALTS comments at 33; GST comments at 25-26; Hyperion comments at 19; ACSI comments at 53, reply at 18-19; MFS comments at 49; MCI comments at 59; Sprint comments at 42; Cox comments at 22; TCI comments at 6; Time Warner comments at 45; WinStar comments at 28, reply at 6-7; Comcast reply at 12; AT&T reply at 5; Kentucky Commission comments at 3; Wyoming Commission comments at 27; *see also* NCTA comments at 8-9; Texas Public Utility Counsel comments at 15; Jones Intercable comments at 10-12, reply at 10-13 (arguing that the Commission should adopt national binding pricing rules); New Jersey Cable Ass'n, *et al.* reply at 6-9, 11 (arguing that the pricing rules adopted by the Commission should be binding); Vanguard reply at 4-5.

develop pricing rules governing transport and termination, interconnection, the provisioning of unbundled network elements, and resale.<sup>181</sup> These parties maintain that nothing in sections 251 and 252 expressly precludes the Commission from establishing pricing rules for the states to apply.<sup>182</sup> Therefore, they argue that the broad grant of authority under section 251(d)(1) includes authority to establish pricing rules.<sup>183</sup>

107. On the other hand, most state commissions, BOCs, and incumbent LEC trade associations contend that nothing in the 1996 Act specifically authorizes the Commission to adopt pricing rules.<sup>184</sup> A group of state commissions and NARUC contend that the Commission's authority to implement the requirements of section 251 is limited to the express activities assigned to the Commission in that section, such as prescribing regulations for resale and numbering portability, determining unbundled network elements, and establishing a North American Numbering Plan Administrator (NANPA) and a cost recovery mechanism for the administrators' operations.<sup>185</sup> The New York Commission contends that the 1996 Act is unambiguous in reserving intrastate pricing to the states under section 252(d), and that any Commission regulations would apply only to states that do not act to open local markets to competition and to those provisions in section 251 that require specific Commission rules.<sup>186</sup> The Ohio Commission asserts that section 251(d)(3) explicitly provides that the Commission

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<sup>181</sup> DoJ comments at 24-25; Sprint comments at 42; Teleport comments at 44; GST comments at 25-26.

<sup>182</sup> *Id.*; see also Citizens Utilities comments at 15-16.

<sup>183</sup> DoJ comments at 24-25; Sprint comments at 42; Teleport comments at 44; GST comments at 25-26.

<sup>184</sup> See, e.g., Wisconsin Commission comments at 4; Ohio Commission comments at 36-39; Florida Commission comments at 24-25; Colorado Commission comments at 10; Pennsylvania Commission comments at 10-11, 26-27; Washington Commission comments at 23; Maryland Commission comments at 11; South Carolina Commission comments at 2; Minnesota Commission reply at 2-3; Nebraska Rural Development Commission comments at 1; Virginia Commission Staff comments at 2-3; Mass. Commission comments at 4; Idaho Commission comments at 10; New York Commission comments at 10, 23, reply at 4-5; Georgia Commission comments at 2-3, 7; Arizona Commission comments at 18; District of Columbia Commission comments at 24-28 (stating that the Commission has authority to adopt non-binding guidelines that would be helpful to states); Missouri Commission comments at 7-8; Texas Commission comments at 21; Alabama Commission comments at 6, 9, 22; Maine Commission, *et al.* comments at 2-4; Illinois Commission comments at 8, 41; Indiana Commission comments at 4-5; New Hampshire Commission, *et al.* reply at 3; NARUC comments at 16-20, reply at 3-5; PacTel comments at 13, 63; SBC comments at 51-53, 70-71; BellSouth comments at 48-49, reply at 31-32; Rural Tel. Coalition comments at 24; USTA comments at 4-5; GTE comments at 59, reply at 3-5; SNET comments at 28; TDS comments at 17 n.14.

<sup>185</sup> NARUC comments at 14-15; Maine Commission, *et al.* comments at 2-4; see also GTE comments at 6-7.

<sup>186</sup> New York Commission comments at 2-3; see also Pennsylvania Commission comments at 10-11, 26-27; Virginia Commission Staff comments at 3.

shall not preclude states from enforcing or implementing the requirements of section 251, as long as the state's policy is consistent with section 251.<sup>187</sup>

108. The Illinois Commission states that section 252(d) governs pricing standards for interconnection and network element charges, transport and termination of traffic, and wholesale services.<sup>188</sup> It argues that each provision expressly establishes standards under which state commissions are to determine prices, without reference to any Commission rulemaking.<sup>189</sup> The Illinois Commission further contends that in establishing standards for state commissions to apply during arbitration under section 252(b), subsections 252(c)(1) and 252(c)(2) distinguish between section 251 and the Commission's regulations prescribed thereunder, and the pricing standards set forth in section 252(d), which do not reference any Commission regulations.<sup>190</sup> The Illinois Commission infers from these subsections that Congress did not intend for the Commission to exercise broad rulemaking authority under sections 251 and 252.<sup>191</sup> Other state commissions similarly argue that the general language of section 251(c)(2)(D) and the specific grant of authority to states under section 252(d) to price interconnection elements reveal Congress's intent to confer responsibility over pricing on the states.<sup>192</sup>

109. *National Standards.* The Department of Justice, the SBA, and most of the LXC's, CAPs, and cable companies addressing this issue agree that the Commission should establish national pricing rules for interconnection and unbundled elements under 252(d)(1) for the reasons stated in the NPRM.<sup>193</sup> Citizens Utilities, NEXTLINK, and WinStar also support the Commission's tentative conclusion that national pricing rules should be adopted to guide the

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<sup>187</sup> Ohio Commission comments at 36-39.

<sup>188</sup> Illinois Commission comments at 7.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 8, 41.

<sup>191</sup> *Id.*

<sup>192</sup> Colorado Commission comments at 10; Pennsylvania Commission comments at 10-11, 26-27; Virginia Commission comments at 2-3; Mass. Commission comments at 4; Arizona Commission comments at 18.

<sup>193</sup> *See, e.g.*, DoJ comments at 25-26; SBA comments at 4; LDDS comments at 19-20, 58; AT&T comments at 45; LCI comments at 3, 12; MCI comments at 59; Sprint comments at 42, reply at 5-11; CompTel comments at 19-22; Vartec, *et al.* comments at 10 (national pricing standards for databases); ALTS comments at 33; Teleport comments at 45-46, reply at 32; Hyperion comments at 3, reply at 5-6; ASCI comments at 51-53; Intermedia comments at 14; MPS comments at 52-54, 58, 64; Cable & Wireless comments at 32; Cox comments at 12, 22, reply at 5, 13-16; Comcast comments at 44; Continental comments at 16; TCI comments at 22-24, reply at 1-3; Jones Intercable comments at 2-4, reply at 3, 9; Time Warner comments at 47, reply at 2, 7-9; *see also* Vanguard reply at 3, 7-9.

states in facilitating the negotiation and arbitration process.<sup>194</sup> The majority of consumer organizations urge the Commission to establish uniform, national rules and argue that inconsistent and unpredictable state rules would inhibit or delay the efforts of new entrants to obtain interconnection arrangements with incumbent LECs and undermine their ability to raise capital in the financial markets.<sup>195</sup> Several state commissions also support the adoption of national rules. For example, the Kentucky Commission contends that national pricing rules would facilitate competitive entry,<sup>196</sup> and the North Dakota Commission argues that such national rules would provide significant assistance to those states that have not opened their local markets to competition.<sup>197</sup>

110. The RBOCs, with the exception of Ameritech, generally oppose the adoption of national pricing rules on legal and policy grounds.<sup>198</sup> The majority of states also express opposition to national pricing rules and argue that section 251(d)(3) reserves to the states the details of local service competition.<sup>199</sup> Other state commissions advocate that the Commission should adopt either preferred outcomes for interconnection that narrow the range of issues in arbitration and negotiation,<sup>200</sup> or general nonbinding guidelines that recognize the rights of states

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<sup>194</sup> See, e.g., Citizens Utilities comments at 15-16; NEXTLINK comments at 24-25; WinStar comments at 28; see also CompTel comments at 19-20.

<sup>195</sup> See, e.g., Ad Hoc Telecommunications Users Committee comments at 3-4, 11, 29-32; SDN Users Ass'n comments at 2; CFA/CU comments at 26; Competition Policy Institute comments at 9-10, reply at 10; see also ITIC comments at 3-5; TRACER comments at 37, reply at 6; NTIA reply at 15-16.

<sup>196</sup> See, e.g., Kentucky Commission comments at 4; see also Texas Public Utility Counsel comments at 15.

<sup>197</sup> See, e.g., North Dakota Commission comments at 1-2.

<sup>198</sup> See, e.g., NYNEX comments at 40-41; SBC comments at 48, 50, reply at 29, 33; PacTel comments at 2, 8, 64, and 65, reply at 23; BellSouth comments at 49, 55, reply at 33; Ameritech comments at 59 (favoring national pricing principles that allow incumbent LECs to recover all costs); see also Cincinnati Bell comments at 20 (supporting FCC rules, but arguing that rules should only be general and for the purpose of guiding states in the negotiation and arbitration process).

<sup>199</sup> See, e.g., Ohio Commission comments at 39-40; Colorado Commission comments at 28, reply at 4-6; Wyoming Commission comments at 20, 27-29; Minnesota reply at 2-3; Maryland Commission comments at 12; New York Commission comments at 11-12, reply at 9-10; Georgia Commission comments at 7, reply at 1; Indiana Commission comments at 2, 21; Alaska Commission comments at 4; Missouri Commission comments at 8; Oregon Commission comments at 30; Alabama Commission comments at 20-21; North Carolina Commission comments at 10; Maine Commission, *et al.* comments at 2-3; California Commission comments at 11-12, reply at 18; Arizona Commission comments at 19; Connecticut Commission comments at 9-10; Washington Commission reply at 2; New Hampshire Commission, *et al.* reply at 2-3; Mississippi Commission comments at 13; Pennsylvania Commission comments at 26; NARUC comments at 23, 24, reply at 12-13; Florida Commission comments at 25; see also Ohio Consumers' Counsel comments at 21, 27; MECA comments at 39-41; Municipal Utilities comments at 17-18, reply at 7; Attorneys General, *et al.* reply at 2, 7; Puerto Rico Tel. comments at 5-6; reply at 9-10; Alaska Tel. Ass'n comments at 2.

<sup>200</sup> See Washington Commission comments at 2.

to adopt their own pricing standards.<sup>201</sup> For instance, the Illinois Commission contends that, if the Commission finds that it has authority to establish pricing rules to govern the states, it could determine that rates for interconnection and unbundled network elements are to be based upon forward-looking costs rather than historical costs, and leave all other details to the states. In addition, the Illinois Commission argues that any pricing standards that the Commission prescribes should be focused narrowly on those services addressed in section 252(d).<sup>202</sup> The Iowa Commission maintains that the Commission's rules may be explicit only to the extent that they prohibit state policies that are inconsistent with section 251.<sup>203</sup> Some incumbent LEC trade associations suggest that the Commission adopt only broad guidelines and minimum pricing requirements.<sup>204</sup> NADO, Joint Consumer Advocates, and the Rural Tel. Coalition oppose the adoption of any national pricing rules on the ground that such a regime would not allow for flexibility and innovation.<sup>205</sup> The Rural Tel. Coalition further asserts that if the Commission insists on prescribing pricing standards for all states, it must take into account the myriad of different classes of customers, geographic characteristics, population densities, and technologies.<sup>206</sup>

### 3. Discussion

111. In adopting sections 251 and 252, we conclude that Congress envisioned complementary and significant roles for the Commission and the states with respect to the rates for section 251 services, interconnection, and access to unbundled elements.<sup>207</sup> We interpret the Commission's role under section 251 as ensuring that rates are just, reasonable, and nondiscriminatory: in doing so, we believe it to be within our discretion to adopt national pricing rules in order to ensure that rates will be just, reasonable, and nondiscriminatory. The Commission is also responsible for ensuring that interconnection, collocation, access to unbundled elements, resale services, and transport and termination of telecommunications are

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<sup>201</sup> See, e.g., Pennsylvania Commission comments at 28; South Carolina Commission comments at 3; Illinois Commission comments at 41, reply at 12-13; Washington Commission comments at 2, 22; see also NYNEX comments at 42.

<sup>202</sup> See Illinois Commission comments at 41-43.

<sup>203</sup> See Iowa Commission comments at 5.

<sup>204</sup> See, e.g., NECA comments at 6; USTA comments at 37; see also George Washington Urban League comments at 2; Alliance for Public Technology comments at 9-11, reply at 1; ALLTEL comments at 4-7, reply at summary.

<sup>205</sup> See NADO, *et al.* at 4, 6; Joint Consumer Advocates reply at 9-10; Rural Tel. Coalition comments at 19, reply at 13-14.

<sup>206</sup> Rural Tel. Coalition comments at 19, reply at 14.

<sup>207</sup> See *infra*, Sections VII and VIII.

reasonably available to new entrants.<sup>208</sup> The states' role under section 252(c) is to establish specific rates when the parties cannot agree, consistent with the regulations prescribed by the Commission under sections 251(d)(1) and 252(d).

112. While we recognize that sections 201 and 202 create a very different regulatory regime from that envisioned by sections 251 and 252, we observe that Congress used terms in section 251, such as the requirement that rates, terms, and conditions be "just, reasonable, and nondiscriminatory," that are very similar to language in sections 201 and 202. This lends additional support for the proposition that Congress intended to give us authority to adopt rules regarding the justness and reasonableness of rates pursuant to section 251, comparable in some respects to the authority Congress gave us pursuant to sections 201 and 202.

113. We believe that national pricing rules are a critical component of the interconnection regime set out in sections 251 and 252. Congress intended these sections to promote opportunities for local competition, and directed us to establish regulations to ensure that rates under this regime would be economically efficient. This, in turn, should reduce potential entrants' capital costs, and should facilitate entry by all types of service providers, including small entities.<sup>209</sup> Further, we believe that national rules will help states review and arbitrate contested agreements in a timely fashion. From August to November and beyond, states will be carrying the tremendous burden of setting specific rates for interconnection and network elements, for resale, and for transport and termination when parties bring these issues before them for arbitration. As discussed in more detail below, we are setting forth default proxies for states to use if they are unable to set these rates using the necessary cost studies within the statutory time frame. After that, both we and the states will need to review the level of competition, revise our rules as necessary, and reconcile arbitrated interconnection arrangements to those revisions on a going-forward basis.

114. We believe that national rules should reduce the parties' uncertainty about the outcome that may be reached by different states in their respective regulatory proceedings, which will reduce regulatory burdens for all parties including small incumbent LECs and small entities. A national regime should also help to ensure consistent federal court decisions on review of specific state orders under sections 251 and 252.<sup>210</sup> In addition, under the national pricing rules that we adopt for interconnection and unbundled network elements, states will retain the flexibility to consider local technological, environmental, regulatory, and economic conditions. Failure to adopt national pricing rules, on the other hand, could lead to widely disparate state

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<sup>208</sup> For a further discussion of specific pricing rules, *see infra*, Section VII.

<sup>209</sup> *See* Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

<sup>210</sup> *See* 47 U.S.C. § 252(e)(6).

policies that could delay the consummation of interconnection arrangements and otherwise hinder the development of local competition. Lack of national rules could also provide opportunities for incumbent LECs to inhibit or delay the interconnection efforts of new competitors, and create great uncertainty for the industry, capital markets, regulators, and courts as to what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital. In sum, we believe that the pricing of interconnection, unbundled elements, resale, and transport and termination of telecommunications is important to ensure that opportunities to compete are available to new entrants.

115. As we observed in the NPRM,<sup>211</sup> section 251 explicitly sets forth certain requirements regarding rates for interconnection, access to unbundled elements, and related offerings. Sections 251(c)(2) and (c)(3) require that incumbent LECs' "rates, terms, and conditions" for interconnection and unbundled network elements be "just, reasonable, and nondiscriminatory in accordance with . . . the requirements of sections 251 and 252."<sup>212</sup> Section 251(c)(4) requires that incumbent LECs offer "for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," without unreasonable conditions or limitations.<sup>213</sup> Section 251(c)(6) provides that all LECs must provide physical collocation of equipment, "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."<sup>214</sup> Section 251(b)(5) requires that all LECs "establish reciprocal compensation arrangements for the transport and termination of telecommunications."<sup>215</sup> Section 251(d)(1) further expressly directs the Commission, without limitation, to "complete all actions necessary to implement the requirements of [section 251]."<sup>216</sup>

116. Section 252 generally sets forth the procedures that state commissions, incumbent LECs, and new entrants must follow to implement the requirements of section 251 and establish specific interconnection arrangements. Section 252(c)(1) provides that "in resolving by arbitration . . . any open issues and imposing conditions upon the parties to the agreement, a State

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<sup>211</sup> NPRM at para. 117.

<sup>212</sup> 47 U.S.C. §§ 251(c)(2) and (c)(3) (emphasis added).

<sup>213</sup> 47 U.S.C. § 251(c)(4) (emphasis added).

<sup>214</sup> 47 U.S.C. § 251(c)(6) (emphasis added).

<sup>215</sup> 47 U.S.C. § 251(b)(5) (emphasis added).

<sup>216</sup> 47 U.S.C. § 251(d)(1).

commission shall . . . ensure that such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251.*"<sup>217</sup>

117. We conclude that, under section 251(d)(1), Congress granted us broad authority to complete all actions necessary to implement the requirements of section 251, including actions necessary to ensure that rates for interconnection, access to unbundled elements, and collocation are "just, reasonable, and nondiscriminatory."<sup>218</sup> We also determine that the statute grants us the authority to define reasonable "wholesale rates" for purposes of services to be resold, and "reciprocal compensation" for purposes of transport and termination of telecommunications.<sup>219</sup> The argument advanced by the New York Commission, NARUC, and others that the Commission's implementing authority under section 251(d)(1) is limited to those provisions in section 251 that mandate specific Commission rules, such as prescribing regulations for number portability, unbundling, and resale, reads into section 251(d)(1) limiting language that the section does not contain. Congress did not confine the Commission's rulemaking authority to only those matters identified in sections 251(b)(2), 251(c)(4)(B), and 251(d)(2), and there is no basis for inferring such an implicit limitation. A narrow reading of section 251(d)(1), as proposed by the New York Commission, NARUC, and others, would require the Commission to neglect its statutory duty to implement the provisions of section 251 and to promote rapid competitive entry into local telephone markets.

118. We also reject the arguments raised by several state commissions that the language in section 252(c) indicates Congress's intent for the Commission to have little or no authority with respect to pricing of interconnection, access to unbundled elements, and collocation. We do not believe that the statutory directive that state commissions establish rates according to section 252(d) restricts our authority under section 251(d)(1). States must comply with both the statutory standards under section 252(d) *and* the regulations prescribed by the Commission pursuant to section 251 when arbitrating rate disputes or when reviewing BOC statements of generally available terms. Section 252(c) enumerates three requirements that states must follow in arbitrating issues.<sup>220</sup> These requirements are not set forth in the alternative; rather, states must comply with all three.

119. We further reject the argument that section 251(d)(3) restricts the Commission's authority to establish national pricing regulations. Section 251(d)(3) provides that the Commission shall not preclude the enforcement of any regulation, order, or policy of a state

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<sup>217</sup> 47 U.S.C. § 252(c)(1) (emphasis added).

<sup>218</sup> See 47 U.S.C. §§ 251(c)(2), (c)(3), and (c)(6).

<sup>219</sup> See 47 U.S.C. §§ 251(b)(5) and (c)(4).

<sup>220</sup> See 47 U.S.C. §§ 252(c)(1), (c)(2), and (c)(3).

commission that, *inter alia*, is consistent with the requirements of section 251 and does not substantially prevent implementation of the requirements of section 251. This subsection, as discussed in section II.C., *supra*, is intended to allow states to adopt regulations that are not inconsistent with the Commission's rules; it does not address state policies that are inconsistent with the pricing rules established by the Commission.

120. We also address the impact of our rules on small incumbent LECs. For example, Rural Tel. Coalition argues that rigid rules, based on the properties of large urban LECs, cannot blindly be applied to small and rural LECs.<sup>221</sup> As discussed above, however, we believe that states will retain sufficient flexibility under our rules to consider local technological, environmental, regulatory, and economic conditions. We also note that section 251(f) may provide relief to certain small carriers.<sup>222</sup>

## E. Authority to Take Enforcement Action

### 1. Background

121. The Commission's implementation of section 251 must be given full effect in arbitrated agreements and incorporated into all such agreements. There is judicial review of such arbitrated agreements, and one issue surely will be the adherence of these agreements to our rules. The Commission will have the opportunity to participate, upon request by a party or a state or by submitting an *amicus* filing, in the arbitration or the judicial review thereof. To clarify our potential role, we consider the extent of the Commission's authority to review and enforce agreements entered into pursuant to section 252. Section 252(e)(6) provides that, in "any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section."<sup>223</sup>

122. In the NPRM, we sought comment on the relationship between sections 251 and 252 and the Commission's existing authority under section 208(a), which allows any person to file a complaint with the Commission regarding "anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof . . ."<sup>224</sup> We asked whether section 208 gives the Commission authority over complaints alleging violations of requirements set forth in sections 251 or 252. We also sought comment on the relationship

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<sup>221</sup> Rural Tel. Coalition reply at 14.

<sup>222</sup> See 47 U.S.C. § 251(f).

<sup>223</sup> 47 U.S.C. § 252(e)(6).

<sup>224</sup> See 47 U.S.C. § 208; see also NPRM at para. 41.

between sections 251 and 252 and any other applicable Commission enforcement authority. We further sought comment on how we might increase the effectiveness of the Commission's enforcement mechanisms. Specifically, we asked for comment on how private rights of action might be used under the Act, and the Commission's role in speeding dispute resolution in forums used by private parties.

## 2. Comments

123. The majority of commenters agree that the Commission's section 208 complaint authority extends to the acts or omissions of common carriers in contravention of sections 251 and 252.<sup>225</sup> TCI further asserts that the Commission retains authority to issue declaratory rulings pursuant to the Administrative Procedure Act, 5 U.S.C. 554(e), and to initiate investigations pursuant to section 403 of the Communications Act.<sup>226</sup> Several state commissions argue, however, that allowing parties to file section 208 complaints would be inconsistent with the states' preeminent role under sections 251 and 252, at least in some circumstances. For example, the New York Commission contends that, to the extent that sections 251 and 252 apply to both interstate and intrastate services, the FCC only has authority to hear complaints regarding interstate communications.<sup>227</sup> The Illinois Commission asserts that a section 208 remedy would be appropriate only after an agreement is implemented, and only to the extent the complaint does not allege that the agreement violates standards set forth in sections 251 and 252.<sup>228</sup>

## 3. Discussion

124. Consistent with our decision in *Telephone Number Portability*<sup>229</sup> and the views of most commenters, we conclude that parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252. Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right

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<sup>225</sup> See, e.g., ALTS comments at 7; AT&T comments at 10-11; BellSouth comments at 9; CompTel comments at 103; Florida Commission comments at 10-11; Ind. Cable & Telecomm. Ass'n reply at 4; Jones Intercable comments at 13-14; MCI comments at 7-8; MFS comments at 8-9; Ohio Commission comments at 17; Sprint comments at 8-9; TCI comments at 10; TCC comments at 62.

<sup>226</sup> TCI comments at 10.

<sup>227</sup> New York Commission reply; see also Wyoming Commission comments at 15-16.

<sup>228</sup> Illinois Commission comments at 16-18.

<sup>229</sup> See *Number Portability Order*.

to bring an action in federal district court.<sup>230</sup> Federal district courts may choose to stay or dismiss proceedings brought pursuant to section 252(e)(6), and refer issues of compliance with the substantive requirements of sections 251 and 252 to the Commission under the primary jurisdiction doctrine.<sup>231</sup> We find, however, that federal court review is not the exclusive remedy regarding state determinations under section 252. The 1996 Act is clear when it intends for a remedy to be exclusive. For example, section 252(e)(6) provides that, if a state commission fails to act, as described in section 252(e)(5), "the proceeding by the Commission under [section 252(e)(5)] and any judicial review of the Commission's actions *shall be the exclusive remedies* for a State commission's failure to act."<sup>232</sup> In contrast, the succeeding sentence in section 252(e)(6) provides that any party aggrieved by a state commission determination under section 252 "may bring an action in an appropriate Federal district court . . . ." <sup>233</sup>

125. The Commission also stands ready to provide guidance to states and other parties regarding the statute and our rules. In addition to the informal consultations that we hope to continue with state commissions, they or other parties may at any time seek a declaratory ruling where necessary to remove uncertainty or eliminate a controversy.<sup>234</sup> Because section 251 is critical to the development of competitive local markets, we intend to act expeditiously on such requests for declaratory rulings.

126. We further conclude that section 252(e)(6) does not divest the Commission of jurisdiction, in whole or in part, over complaints that a common carrier violated section 251 or 252 of the Act. Section 601(c)(1) of the 1996 Act provides that the 1996 Act "shall not be construed to modify, impair or supersede" existing federal law -- which includes the section 208 complaint process -- "unless expressly so provided."<sup>235</sup> Sections 251 and 252 do not divest the Commission of its section 208 complaint authority.

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<sup>230</sup> Commenters also suggest that the statute's provision for federal district court review of state public utility commission decisions is inconsistent with the 11th Amendment. That issue is not properly before the Commission since it is the federal courts that will have to determine the scope of their jurisdiction and in any case "regulatory agencies are not free to declare an act of Congress unconstitutional." See *Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987).

<sup>231</sup> See *Reiter v. Cooper*, 507 U.S. 258, 268-269 (1993); *Allnet Comm. Servs. v. National Exchange Carrier Ass'n*, 965 F.2d 1118 (D.C. Cir. 1992); see also TCC Comments at 61.

<sup>232</sup> 47 U.S.C. § 252(e)(6) (emphasis added).

<sup>233</sup> *Id.* (emphasis added).

<sup>234</sup> See 47 C.F.R. § 1.2 (the Commission, in accordance with section 5(d) of the Administrative Procedures Act, 5 U.S.C. § 554(e), may issue a declaratory ruling terminating a controversy or removing uncertainty).

<sup>235</sup> 47 U.S.C. § 601(c)(1).

127. An aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission. Alternatively, a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated agreement. We plan to initiate a proceeding to adopt expedited procedures for resolving complaints filed pursuant to section 208.

128. We note that, in acting on a section 208 complaint, we would not be directly reviewing the state commission's decision, but rather, our review would be strictly limited to determining whether the common carrier's actions or omissions were in contravention of the Communications Act.<sup>236</sup> Thus, consistent with our past decisions in analogous contexts,<sup>237</sup> we conclude that a person aggrieved by a state determination under sections 251 and 252 of the Act may elect to either bring an action for federal district court review or a section 208 complaint to the Commission against a common carrier. Such a person could, as a further alternative, pursuant to section 207, file a complaint against a common carrier with the Commission or in federal district court for the recovery of damages.<sup>238</sup> We are unlikely, in adjudicating a complaint, to examine the consistency of a state decision with sections 251 and 252 if a judicial determination has already been made on the issues before us.<sup>239</sup>

129. Finally, we clarify, as one commenter requested,<sup>240</sup> that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law. In addition, in appropriate circumstances, the Commission could institute an inquiry on its own motion, 47 U.S.C. § 403, initiate a forfeiture proceeding, 47 U.S.C. § 503(b), initiate a cease-and-desist proceeding, 47 U.S.C. § 312(b), or in extreme cases, consider initiating a revocation proceeding for violators

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<sup>236</sup> While we would have authority to review such complaints, we note that we might decline, at least in some instances, to impose financial penalties upon a common carrier that is acting pursuant to state requirements or authorization, even if we sustain the allegations in the complaint.

<sup>237</sup> See *Number Portability Order, supra*; *Freemon v. AT&T*, 9 FCC Rcd 4032, 4033 (1994) (provision permitting persons aggrieved by violation of prohibition against unauthorized publication of certain communications to "bring a civil action in United States district court or any other court of competent jurisdiction" did not bar a complaint under section 208 of the Communications Act); see also *Policies Governing the Provision of Shared Telecommunications Service*, 3 FCC Rcd 6931 (1988) (the section 208 complaint process is available to resolve any specific problems that might arise regarding shared telecommunications service regulation by a state that impinges upon a federal interest).

<sup>238</sup> See 47 U.S.C. § 207.

<sup>239</sup> *Town of Deerfield v. FCC*, 992 F.2d 420, 428-430 (2d Cir. 1993).

<sup>240</sup> See MCI comments at 9.

with radio licenses, 47 U.S.C. § 312(a), or referring violations to the Department of Justice for possible criminal prosecution under 47 U.S.C. § 501, 502 & 503(a).

**F. Regulations of BOC Statements of Generally Available Terms**

130. We noted in the NPRM that section 251 and our implementing regulations govern the states' review of BOC statements of generally available terms and conditions,<sup>241</sup> as well as arrangements reached through compulsory arbitration pursuant to section 252(b).<sup>242</sup> We tentatively concluded that we should adopt a single set of standards with which both arbitrated agreements and BOC statements of generally available terms must comply.

131. Only a few commenters addressed this issue, and most concurred with the tentative conclusion that we should apply the same requirements to both arbitrated agreements and BOC statements of generally available terms.<sup>243</sup> The Illinois Commission, for example, asserts that, "[s]ince the generally available terms could be viewed as a baseline against which to craft arbitrated arrangements, it is reasonable to hold both arbitrated agreements and the BOC statements of generally available terms to the same standards."<sup>244</sup> CompTel asserts that, particularly if states require incumbent LECs to tariff the terms and conditions in agreements that are subject to arbitration, there will be few if any distinctions between arbitrated agreements and generally available terms and conditions.<sup>245</sup>

132. We hereby find that our tentative conclusion that we should apply a single set of standards to both arbitrated agreements and BOC statements of generally available terms is consistent with both the text and purpose of the 1996 Act. BOC statements of generally available terms are relevant where a BOC seeks to provide in-region interLATA service, and the BOC has not negotiated or arbitrated an agreement. Therefore, such statements are to some extent a substitute for an agreement for interconnection, services, or access to unbundled elements. We also find no basis in the statute for establishing different requirements for arbitrated agreements and BOC statements of generally available terms. Moreover, a single set of requirements will substantially ease the burdens of state commissions and the FCC in

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<sup>241</sup> See 47 U.S.C. §§ 252(f) and 271(c)(2)(B).

<sup>242</sup> NPRM at para. 36 (citing 47 U.S.C. §§ 252(b), (f)).

<sup>243</sup> ACTA comments at 4; Arch comments at 5; BellSouth comments at 7; CompTel comments at 105; Illinois Commission comments at 14; MCI comments at 7; Sprint comments at 8.

<sup>244</sup> Illinois Commission comments at 14.

<sup>245</sup> Comptel comments at 105.

reviewing agreements and statements of generally available terms pursuant to sections 252 and 271.

**G. States' Role in Fostering Local Competition Under Sections 251 and 252**

133. As already referenced, states will play a critical role in promoting local competition, including by taking a key role in the negotiation and arbitration process. We believe the negotiation/arbitration process pursuant to section 252 is likely to proceed as follows. Initially, the requesting carrier and incumbent LEC will seek to negotiate mutually agreeable rates, terms, and conditions governing the competing carrier's interconnection to the incumbent's network, access to the incumbent's unbundled network elements, or the provision of services at wholesale rates for resale by the requesting carrier. Either party may ask the relevant state commission to mediate specific issues to facilitate an agreement during the negotiation process.

134. Because the new entrant's objective is to obtain the services and access to facilities from the incumbent that the entrant needs to compete in the incumbent's market, the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation. Indeed, the entrant has nothing that the incumbent needs to compete with the entrant, and has little to offer the incumbent in a negotiation. Consequently, the 1996 Act provides that, if the parties fail to reach agreement on all issues, either party may seek arbitration before a state commission. The state commission will arbitrate individual issues specified by the parties, or conceivably may be asked to arbitrate the entire agreement. In the event that a state commission must act as arbitrator, it will need to ensure that the arbitrated agreement is consistent with the Commission's rules. In reviewing arbitrated and negotiated agreements, the state commission may ensure that such agreements are consistent with applicable state requirements.

135. Under the statutory scheme in sections 251 and 252, state commissions may be asked by parties to define specific terms and conditions governing access to unbundled elements, interconnection, and resale of services beyond the rules the Commission establishes in this Report and Order. Moreover, the state commissions are responsible for setting specific rates in arbitrated proceedings. For example, state commissions in an arbitration would likely designate the terms and conditions by which the competing carrier receives access to the incumbent's loops. The state commission might arbitrate a description or definition of the loop, the term for which the carrier commits to the purchase of rights to exclusive use of a specific network element, and the provisions under which the competing carrier will order loops from the incumbent and the incumbent will provision an order. The state commission may establish procedures that govern should the incumbent refurbish or replace the element during the agreement period, and the procedures that apply should an end user customer decide to switch from the competing carrier back to the incumbent or a different provider. In addition, the state

commission will establish the rates an incumbent charges for loops, perhaps with volume and term discounts specified, as well as rates that carriers may charge to end users.

136. State commissions will have similar responsibilities with respect to other unbundled network elements such as the switch, interoffice transport, signalling and databases. State commissions may identify network elements to be unbundled, in addition to those elements identified by the Commission, and may identify additional points at which incumbent LECs must provide interconnection, where technically feasible. State commissions are responsible for determining when virtual collocation may be provided instead of physical collocation, pursuant to section 251(c)(6). States also will determine, in accordance with section 251(f)(1), whether and to what extent a rural incumbent LEC is entitled to continued exemption from the requirements of section 251(c) after a telecommunications carrier has made a bona fide request under section 251. Under section 251(f)(2), states will determine whether to grant petitions that may be filed by certain LECs for suspension or modification of the requirements in sections 251(b) or (c).

137. The foregoing is a representative sampling of the role that states will have in steering the course of local competition. State commissions will make critical decisions concerning a host of issues involving rates, terms, and conditions of interconnection and unbundling arrangements, and exemption, suspension, or modification of the requirements in section 251. The actions taken by a state will significantly affect the development of local competition in that state. Moreover, actions in one state are likely to influence other states, and to have a substantial impact on steps the FCC takes in developing a pro-competitive national policy framework.

### III. DUTY TO NEGOTIATE IN GOOD FAITH

#### A. Background

138. Section 251(c)(1) of the statute imposes on incumbent LECs the "duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described" in sections 251(b) and(c), and further provides that "(t)he requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements."<sup>246</sup> In the NPRM, we asked parties to comment on the extent to which the Commission should establish national rules defining the requirements of the good faith negotiation obligation.

#### B. Advantages and Disadvantages of National Rules

##### 1. Comments

139. Some potential new entrants and other parties assert that clear national guidelines will prevent incumbent LECs from abusing their bargaining power for the purpose of undermining efforts to eliminate barriers to competition.<sup>247</sup> Some parties also assert that, in the absence of specific rules, negotiations between potential competitors are likely to be needlessly prolonged and contentious.<sup>248</sup> SBA claims that delay and other anticompetitive tactics are particularly burdensome on small businesses.<sup>249</sup> In addition, Independent Cable & Telecommunications Ass'n expresses concern that states might establish guidelines that favor the incumbent.<sup>250</sup> Other parties agree that national rules defining some limited aspects of good faith can simplify both negotiations and dispute resolution, but nevertheless contend that the Commission should not establish extensive or detailed rules in this area, because the facts and tactics of various negotiations will display only a few characteristics in common.<sup>251</sup>

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<sup>246</sup> 47 U.S.C. § 251(c)(1).

<sup>247</sup> See, e.g., AT&T comments at 86-88; CEDRA comments at 1-9; TCC comments at 7-13.

<sup>248</sup> See, e.g., ACSI comments at 7-11; AT&T comments at 86-88; Centennial Cellular Corp. comments at 2-10; Cox comments at 43-46; NCTA comments at 59-63.

<sup>249</sup> SBA comments at 8.

<sup>250</sup> Ind. Cable & Telecomm. Ass'n reply at 7.

<sup>251</sup> See, e.g., Georgia Commission comments at 6; Pennsylvania Commission comments at 19-20; SBA comments at 9; Sprint comments at 10-11; Attorneys General reply at 12-13.

140. Some incumbent LECs and other parties contend that the FCC need not establish any rules regarding good faith negotiation, because the statute builds in a remedy of arbitration for parties that are dissatisfied with the negotiation process.<sup>252</sup> They maintain that national rules are inappropriate because a determination of whether a party has acted in good faith requires examination of specific facts that will not describe a pattern across the country.<sup>253</sup> SBC contends that national standards are inflexible, and thus will slow down the negotiation process, and that national rules are unnecessary, because the 1996 Act provides incentives for incumbents to negotiate.<sup>254</sup> Some parties also claim that section 252(b)(5) sets forth standards for good faith negotiation, and that provision makes no mention of a role for the FCC.<sup>255</sup>

## 2. Discussion

141. We conclude that establishing some national standards regarding the duty to negotiate in good faith could help to reduce areas of dispute and expedite fair and successful negotiations, and thereby realize Congress's goal of enabling swift market entry by new competitors. In order to address the balance of the incentives between the bargaining parties, however, we believe that we should set forth some minimum requirements of good faith negotiation that will guide parties and state commissions. As discussed above, the requirements in section 251 obligate incumbent LECs to provide interconnection to competitors that seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. Generally, the new entrant has little to offer the incumbent. Thus, an incumbent LEC is likely to have scant, if any, economic incentive to reach agreement. In addition, incumbent LECs argue that requesting carriers may have incentives to make unreasonable demands or otherwise fail to act in good faith.<sup>256</sup> The fact that an incumbent LEC has superior bargaining power does not itself demonstrate a lack of good faith, or ensure that a new entrant will act in good faith.

142. We agree with commenters that it would be futile to try to determine in advance every possible action that might be inconsistent with the duty to negotiate in good faith. As

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<sup>252</sup> BellSouth comments at 10-11; Texas Commission comments at 6-8; USTA comments at 8; *see also* District of Columbia Commission comments at 14-17.

<sup>253</sup> *See, e.g.*, Bell Atlantic comments at 47 (citing *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, WT Docket 95-157, Notice of Proposed Rulemaking, FCC 96-196 (rel. Apr. 30, 1996)); Citizens Utilities comments at 6; Illinois Commission comments at 20-21; Ohio Commission comments at 21.

<sup>254</sup> SBC comments at 12-15.

<sup>255</sup> Citizens Utilities comments at 6; SBC comments at 7, 20.

<sup>256</sup> *See e.g.*, Bell Atlantic comments at 49; U S West comments at 40-42.

discussed more fully below, determining whether or not a party's conduct is consistent with its statutory duty will depend largely on the specific facts of individual negotiations. Therefore, we believe that it is appropriate to identify factors or practices that may be evidence of failure to negotiate in good faith, but that will need to be considered in light of all relevant circumstances.

143. Consistent with our discussion in Section II, above, we believe that the Commission has authority to review complaints alleging violations of good faith negotiation pursuant to section 208.<sup>257</sup> Penalties may be imposed under sections 501, 502 and 503 for failure to negotiate in good faith. In addition, we believe that state commissions have authority, under section 252(b)(5), to consider allegations that a party has failed to negotiate in good faith. We also reserve the right to amend these rules in the future as we obtain more information regarding negotiations under section 252.

### C. Specific Practices that May Constitute a Failure to Negotiate in Good Faith

#### 1. Comments

144. The comments included numerous suggestions regarding what might constitute a violation of the duty to negotiate in good faith. Commenters disagree about whether requiring another party to sign a nondisclosure agreement constitutes failure to negotiate in good faith. Some parties urge the Commission to prohibit nondisclosure agreements altogether,<sup>258</sup> but other parties assert that there may be legitimate reasons to seek nondisclosure.<sup>259</sup> Some parties assert that the Commission should only prohibit overly broad or restrictive nondisclosure agreements, such as agreements that cover information that is not commercially sensitive, or that require withholding information from regulatory agencies.<sup>260</sup> Some potential competitors also propose that incumbents should not be permitted to refuse to negotiate until a requesting carrier signs a nondisclosure agreement.<sup>261</sup>

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<sup>257</sup> We previously have held that parties may raise allegations regarding good faith negotiation pursuant to section 208. *Cellular Interconnection Proceeding*, 4 FCC Rcd 2369, 2371 (1989). The Commission also held in that case that "the conduct of good faith negotiations is not jurisdictionally severable." *Id.* at 2371.

<sup>258</sup> See, e.g., LCI comments at 24; SBA comments at 9; TCI comments at 24.

<sup>259</sup> See, e.g., Bell Atlantic comments at 48-49; GVNW comments at 3-4; Illinois Commission comments at 21; Sprint comments at 11-12; USTA comments at 8 n.11; U S West comments at 39-40.

<sup>260</sup> See, e.g., GST comments at 5; MFS comments at 10-14; TCC comments at 9 (very broad nondisclosure agreements puts the incumbent in a powerful position, because it has information about numerous companies and the competitor does not have access to that same information); Teleport comments at 5-10; Texas Commission comments at 6-8.

<sup>261</sup> See, e.g., ACTA comments at 6-7; Arch comments at 9-10; ITIC comments at 7-8; NCTA comments at 59-63; Teleport comments at 5-10; *accord* Washington Commission comments at 12.

145. Commenters assert that other practices constitute a violation of the duty to negotiate in good faith. For example, most commenters on this issue agree that demands that a party limit its legal rights or remedies signal a lack of good faith.<sup>262</sup> Many new entrants also assert that actions that have the purpose or effect of delaying or impeding negotiations constitute failure to negotiate in good faith. For example, GST asserts parties should be required to respond within a reasonable time to a request to begin negotiations.<sup>263</sup> Some parties also claim that failing to respond to a proposal or participate meaningfully and with the intention of reaching agreement demonstrates a lack of good faith.<sup>264</sup> For instance, Time Warner contends that a party may not simply present proposals that do not include critical terms, or that it knows are unacceptable.<sup>265</sup> Parties also maintain that establishing preconditions, such as requiring requesting carriers to complete unnecessary forms before beginning negotiations, should be prohibited.<sup>266</sup>

146. New entrants argue that the failure of an incumbent LEC to provide information necessary to conduct meaningful negotiations constitutes a refusal to negotiate in good faith.<sup>267</sup> Incumbent LECs similarly assert that requesting carriers should be required to provide certain information necessary to respond to their requests. For example, U S West states that an incumbent should be able to require a carrier that seeks interconnection to disclose what it wants to obtain, where, when, and for what duration.<sup>268</sup> U S West contends that a requesting carrier should not be permitted to demand immediate unbundling or interconnection, thereby forcing the incumbent to incur costs, while refusing to provide a proposed purchase and deployment schedule. Some incumbent LECs advocate a "bona fide request" requirement for all

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<sup>262</sup> See, e.g., ACTA comments at 6-7; Illinois Commission comments at 21; SBA comments at 9; Sprint comments at 11; TCI comments at 24; Washington Commission comments at 12.

<sup>263</sup> GST comments at 5; *accord* ACSI comments at 7-11; Bell Atlantic comments at 49 (refusing to schedule negotiations after making a request demonstrates bad faith); MFS comments at 10-14; Time Warner comments at 22-23.

<sup>264</sup> MFS comments at 10-14; Time Warner comments at 22-23.

<sup>265</sup> Time Warner comments at 22.

<sup>266</sup> ALTS comments at 12; AT&T comments at 86-88; Cox comments at 45-46; Excel comments at 8-9; Intelcom comments at 3-13; ITIC comments at 7-8; MFS comments at 10-14; LCI comments at 23; NCTA comments at 59-60; Time Warner comments at 22; Washington Commission comments at 12; NTIA reply at 6 n.14.

<sup>267</sup> See, e.g., ACSI comments at 7-11; AT&T comments at 86-88; Cox comments at 45-46; GST comments at 6-7; MFS comments at 10-14 (for example, incumbent LECs must provide detailed documentation to support claims that a request to unbundle an element is technically infeasible); TCC comments at 9 (incumbent LECs must provide cost studies that underlie proposed rates); Time Warner comments at 22.

<sup>268</sup> U S West comments at 40-42.

interconnection requests.<sup>269</sup> Under such a requirement, a requesting carrier would have to: (1) certify that it will make use of the services or facilities it requests within a specified period from the date of the request; (2) describe the purpose of the request; (3) specify precisely what it was requesting; and (4) agree to purchase the requested services or facilities for a minimum time. Other parties specifically object to a "bona fide request" requirement. For example, LCI states that such a requirement would force a carrier to agree to purchase services or facilities before prices and other terms and conditions have been established.<sup>270</sup>

147. Other practices to which some commenters object include a refusal to negotiate any proposed term or condition, or conditioning negotiation on one issue upon first reaching agreement on another issue.<sup>271</sup> Time Warner contends, for example, that parties should not be permitted to require agreement on non-price terms before beginning to negotiate prices.<sup>272</sup> Time Warner also contends that it is a failure to negotiate in good faith to link negotiations under section 252 with negotiations between parties in another context. Some parties contend that it demonstrates a lack of good faith for a party to fail to appoint a representative in negotiations that has authority to bind the party it represents,<sup>273</sup> or at least authority to enter into tentative agreements on behalf of such party,<sup>274</sup> and that such failure needlessly delays negotiations. SCBA asserts that delays caused by failing to appoint an appropriate representative are particularly burdensome on small cable operators, which lack the resources to endure protracted negotiations and arbitrations.<sup>275</sup>

## 2. Discussion

148. The Uniform Commercial Code defines "good faith" as "honesty in fact in the conduct of the transaction concerned."<sup>276</sup> When looking at good faith, the question "is a narrow

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<sup>269</sup> See, e.g., Cincinnati Bell comments at 8-9; GTE comments at 15-17; PacTel comments at 16-21; TDS comments at 5-6; Anchorage Tel. Utility reply at 6-7.

<sup>270</sup> LCI comments at 24; accord GCI reply at 3.

<sup>271</sup> ALTS comments at 12; AT&T comments at 86-88; BellSouth comments at 10-11; Time Warner comments at 22.

<sup>272</sup> Time Warner comments at 26.

<sup>273</sup> AT&T comments at 86-88; CEDRA comments at 8.

<sup>274</sup> MFS comments at 10-14.

<sup>275</sup> SCBA comments at 10; accord Excel comments at 8-9; SBA comments at 8; Frontier reply at 6.

<sup>276</sup> U.C.C. § 1-201(19) (1981); see also Black's Law Dictionary at 353 (Abridged ed. 1983) ("Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud or to seek an unconscionable

one focused on the subjective intent with which the person in question has acted."<sup>277</sup> Even where there is no specific duty to negotiate in good faith, certain principles or standards of conduct have been held to apply.<sup>278</sup> For example, parties may not use duress or misrepresentation in negotiations.<sup>279</sup> Thus, the duty to negotiate in good faith, at a minimum, prevents parties from intentionally misleading or coercing parties into reaching an agreement they would not otherwise have made. We conclude that intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach agreement.

149. Because section 252 permits parties to seek mediation "at any point in the negotiation,"<sup>280</sup> and also allows parties to seek arbitration as early as 135 days after an incumbent LEC receives a request for negotiation under section 252,<sup>281</sup> we conclude that Congress specifically contemplated that one or more of the parties may fail to negotiate in good faith, and created at least one remedy in the arbitration process.<sup>282</sup> The possibility of arbitration itself will facilitate good faith negotiation. For example, parties seeking to avoid a legitimate accusation of breach of the duty of good faith in negotiation will work to provide their negotiating adversary all relevant information – given that section 252(b)(4)(B) authorizes the state commission to require the parties "to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues."<sup>283</sup> That provision also states that, if either party "fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived."<sup>284</sup> The likelihood that an arbitrator will review the positions taken by the parties during negotiations also should discourage parties from refusing unreasonably to provide relevant information to each other or to delay negotiations.

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advantage . . .").

<sup>277</sup> U.C.C. § 1-201 (84).

<sup>278</sup> Steven J. Burton and Eric G. Anderson, *Contractual Good Faith*, § 8.2.2 at 332 (1995).

<sup>279</sup> *Id.*, § 8.3.1 at 335-341.

<sup>280</sup> 47 U.S.C. § 252(a)(2).

<sup>281</sup> 47 U.S.C. § 252(b)(1).

<sup>282</sup> Section 252(b)(4)(C) requires state commissions to "conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section." 47 U.S.C. § 252(b)(4)(C).

<sup>283</sup> 47 U.S.C. § 252(b)(4)(B).

<sup>284</sup> *Id.*

150. We believe that determining whether a party has acted in good faith often will need to be decided on a case-by-case basis by state commissions or, in some instances the FCC, in light of all the facts and circumstances underlying the negotiations.<sup>285</sup> In light of these considerations, we set forth some minimum standards that will offer parties guidance in determining whether they are acting in good faith, but leave specific determinations of whether a party has acted in good faith to be decided by a state commission, court, or the FCC on a case-by-case basis.

151. We find that there may be pro-competitive reasons for parties to enter into nondisclosure agreements. A broad range of commenters, including IXCs, state commissions, and incumbent LECs, support this view. We conclude that there can be nondisclosure agreements that would not constitute a violation of the good faith negotiation duty, but we caution that overly broad, restrictive, or coercive nondisclosure requirements may well have anticompetitive effects. We therefore will not prejudge whether a party has demonstrated a failure to negotiate in good faith by requesting another party to sign a nondisclosure agreement, or by failing to sign a nondisclosure agreement; such demands by incumbents, however, are of concern and any complaint alleging such tactics should be evaluated carefully. Agreements may not, however, preclude a party from providing information requested by the FCC, a state commission, or in support of a request for arbitration under section 252(b)(2)(B).

152. We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. In some circumstances, however, a party may violate this statutory provision by demanding that another waive its legal rights. For example, we agree with ALTS' contention that an incumbent LEC may not demand that the requesting carrier attest that the agreement complies with all provisions of the 1996 Act, federal regulations, and state law,<sup>286</sup> because such a demand would be at odds with the provisions of sections 251 and 252 that are intended to foster opportunities for competition on a level playing field. In addition, we find that it is a *per se* failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit a party to include such a provision would be tantamount to forcing a party to waive its legal rights in the future.

153. We decline to find that other practices identified by parties constitute *per se* violations of the duty to negotiate in good faith. Time Warner contends that we should find that

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<sup>285</sup> This is consistent with earlier Commission decisions. See *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, WT Docket 95-157, First Report and Order, FCC 96-196, at para. 20 (rel. Apr. 30, 1996).

<sup>286</sup> ALTS comments at Attachment A, 15.

a party is not negotiating in good faith under section 252 if it seeks to tie resolution of issues in that negotiation to the resolution of other, unrelated disputes between the parties in another proceeding. On its face, the hypothetical practice raises concerns. Time Warner, however, did not present specific examples of how linking two independent negotiation proceedings would undermine good faith negotiations. We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding *quid pro quo* concessions in another proceeding. Parties, however, could mutually agree to link section 252 negotiations to negotiations on a separate matter. In fact, to the extent that concurrent resolution of issues could offer more potential solutions or may equalize the bargaining power between the parties, such action may be pro-competitive.<sup>287</sup>

154. We agree with parties contending that actions that are intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith.<sup>288</sup> The Commission will not condone any actions that are deliberately intended to delay competitive entry, in contravention of the statute's goals. We agree with SCBA that small entities seeking to enter the market may be particularly disadvantaged by delay. However, whether a party has failed to negotiate in good faith by employing unreasonable delaying tactics must be determined on a specific, case-by-case basis. For example, a party may not refuse to negotiate with a requesting telecommunications carrier, and a party may not condition negotiation on a carrier first obtaining state certification.<sup>289</sup> A determination based upon the intent of a party, however, is not susceptible to a standardized rule. If a party refuses throughout the negotiation process to designate a representative with authority to make binding representations on behalf of the party, and thereby significantly delays resolution of issues, such action would constitute failure to negotiate in good faith.<sup>290</sup> In particular, we believe that designating a representative authorized to make binding representations on behalf of a party will assist small entities and small incumbent

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<sup>287</sup> For example, an incumbent LEC that offers video programming may be negotiating for the right to use video programming owned by a cable company while the cable company is negotiating terms for interconnecting with the incumbent LEC. Addressing some or all of the issues in the two negotiations collectively could expand the options for reaching agreement, and would equalize the parties' bargaining power, because each has something that the other party desires.

<sup>288</sup> See *United States v. American Tel. and Tel. Co.*, 524 F. Supp. 1336, 1356 and n.84 (D.D.C. 1981); see also *National Labor Relations Board v. Katz*, 369 U.S. 736, 742 (1962); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 FCC Rcd 468, 472 (1989).

<sup>289</sup> See, e.g., ALTS comments at 12-13 (contending that U S West has refused to start negotiations until it formed its positions regarding section 251, and that SBC has attempted to interpret and "enforce" state certification requirements).

<sup>290</sup> The Commission has reached a consistent conclusion in other instances. See, e.g., *Application of Gross Telecasting, Inc.*, 92 FCC 2d 250, 442 (1981); *Public Notice, FCC Asks for Comments Regarding the Establishment of and Advisory Committee to Negotiate Proposed Regulations*, 7 FCC Rcd 2370, 2372 (1992).